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IN THE

Supreme Court of the United States

October Term, 1964

No. 605

DAVID MCREYNOLDS and FRITZ PAPPENHEIM,

Petitioners,

vs.

ROBERT K. CHRISTENBERRY, Postmaster, New York, New York; JOHN A. GRONOUSKI, Postmaster General of the United States; DOUGLAS DILLON, Secretary of the Treasury of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

The opinion of the District Court for the Southern District of New York (R. 135-147; Appendix, *infra*, pp. 2a-11a) is not yet reported. There is no opinion of the Court of Appeals, this petition being submitted prior to judgment therein.

Jurisdiction

The opinion of the District Court dismissing the amended complaint was filed on July 31, 1964; and judgment thereon (R. 150-152; Appendix, *infra*, p. 1a) was thereafter entered. The notice of appeal to the Court of Appeals (R. 148) was filed on August 18, 1964; the record on appeal was filed and the case docketed in the Court of Appeals (as No. 29,146) on September 2, 1964.

This action arose under Section 4008 of Title 39 of the United States Code (Public Law 87-793, Laws of October 11, 1962, 76 Stat. 840, effective January 7, 1963), which section regulates delivery of unsealed mail by the United States Post Office. The District Court had jurisdiction of this action pursuant to Section 1339 of Title 28 of the United States Code, in that it is a civil action arising under an Act of Congress relating to the postal service.

This Court has jurisdiction to grant this petition under United States Code, Title 28, Section 1254(1), providing for review by writ of certiorari of any case in the courts of appeals either before or after rendition of judgment.

Questions Presented for Review

1. Whether the Postmaster General can avoid judicial review of the constitutionality of his powers under a statute relating to "communist political propaganda," by modifying its application to petitioners because of their institution of suit, and even though he continues to list them as persons desiring delivery of "communist political propaganda."

2. Whether the statute giving the Postmaster General power to classify unsealed mail as "Communist political

propaganda" and to destroy it unless the addressee explicitly requests delivery of such "propaganda," violates the First, Fourth and Fifth Amendments to the Constitution.

Statutes Involved

Title 39, United States Code, Section 4008, hereinafter called the statute, reads:

Communist political propaganda

(a) Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be "communist political propaganda", shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs.

(b) For the purposes of this section, the term "communist political propaganda" means political propaganda, as defined in section 1(j) of the Foreign Agents Registration Act of 1938, as amended (22 U. S. C.

611(j)), issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions pursuant to section 5 of the Trade Agreements Extension Act of 1951 or section 231 of the Trade Expansion Act of 1962, or any country from which any type of foreign assistance is withheld pursuant to section 620(f) of the Foreign Assistance Act of 1961, as amended.

(c) The provisions of this section shall not be applicable with respect to (1) matter addressed to any United States Government agency, or any public library, or to any college, university, graduate school, or scientific or professional institution for advanced studies, or any official thereof, or (2) material whether or not "communist political propaganda" addressed for delivery in the United States pursuant to a reciprocal cultural international agreement under which the United States Government mails an equal amount of material for delivery in any country described in subsection (b).

Title 22, United States Code, Section 611, reads in part:

Definitions

• • •

(j) The term "political propaganda" includes any . . . communication . . . (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the

United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence. . . .

Statement of the Case

Allegations of Amended Complaint (R. 24-43)

Under 39 U. S. C. 4008 an addressee is notified of a decision that his mail is "Communist political propaganda," by a postcard. The card states that the Post Office is holding mail for him which "Under Public Law 87-793, the Customs Bureau of the Treasury Department has determined . . . to be Communist political propaganda," and that the mail will not be delivered unless he "want(s) it," and so directs the Post Office on the return part of the card. If the card is not returned by a specified date—set at approximately 20 days after the notification—"it will be assumed" the addressee does not want the mail (Exhibits B and E to the Complaint; reproduced in Appendix, *infra*, pp. 12a, 13a).

Plaintiff McReynolds received the "Communist political propaganda" notice with respect to an issue of a leaflet called "The Crusader". He did not request delivery because making the request required that he list himself with a Government agency as an individual desiring delivery of "Communist political propaganda". Further, because of the Post Office classification of "The Crusader," plaintiff McReynolds abstained from depositing in the domestic mail a prior issue of "The Crusader" which he had

received free of Post Office interception, for fear that it and his addressee would be subjected to the statutory procedure.

Plaintiff Pappenheim, a sociologist, purchased a number of books and pamphlets at a New York bookstore in December 1963, some of his use in preparation of a sociological treatise. They were mailed by the bookstore to his residence in Cambridge, Massachusetts, the return address on the package being that of the bookstore. The Post Office sent him the "Communist political propaganda" notification, listing thereon some of these books. He did not return the card requesting delivery because of unwillingness to list himself with a Government agency as an individual desiring "Communist political propaganda." After he had addressed two letters inquiring for further details to the Post Office, he received on March 6th the package of books purchased and mailed in December.[1]

The complaint alleged that the statute violates the First and Fifth Amendments, and asked for a declaratory judgment of its unconstitutionality, an injunction of its enforcement, expungement of plaintiffs' names from all lists and records indicating that they are addressees of "communist political propaganda," and damages for violation of their constitutional rights.

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[1] As a result of the filing of suit for Mr. Pappenheim, undersigned counsel received a letter from the President of the American Association for the Advancement of Slavic Studies, Professor Joseph S. Berliner of Brandeis University, stating that the "Association has long been interested in the legislation dealing with the confiscation of 'subversive' literature, much of which constitutes the stock in trade of our scholarly research efforts." Professor Berliner enclosed a memorandum summarizing an Association survey of its membership as to the effect of the statute, which appears in the Appendix, *infra*, pp. 14a-17a.

Defendants' Motion to Dismiss

The affidavit of the General Counsel for the Postmaster General, submitted with the Government's motion to dismiss, states that because of the filing of the instant suit, he instructed the New York Postmaster to deliver "all Communist political propaganda mail addressed to (plaintiff McReynolds) . . . as it is received in the future" without contacting plaintiff about it; the Postmaster replied that "all future mailings received for him will be promptly released for delivery" (R. 47-48). The same arrangement was made with respect to plaintiff Pappenheim (R. 133-134).

Before decision on petitioners' motion to convene a three-judge court and respondents' motion to dismiss the complaint, a three-judge court in the Southern District of New York decided *Lamont* v. *Postmaster General.* After Lamont's institution of suit contesting the constitutionality of the statute, the Post Office Department had issued the same instruction respecting the delivery of Lamont's mail as that issued herein and issued in the case of each plaintiff who has commenced suit.[2] The three-judge court dismissed Lamont's complaint as moot and non-justiciable. While the *Lamont* court indicated that the instant case was distinguishable (Jdl. St. Appendix pp. 13a-13b) and while the judge below also noted some points of difference, he dismissed the instant complaint on the basis of the *Lamont* decision.

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[2] See p. 11 of Jurisdictional Statement in *Lamont* v. *Postmaster General,* filed Sept. 12, 1964 (docketed as No. 491) hereinafter called "Jdl. St."

REASONS FOR GRANTING WRIT

I.

This writ is sought before judgment by the Court of Appeals because of the appeal pending in this Court in *Lamont* v. *Postmaster*. The instant case involves aspects of the statute related but additional to those in *Lamont*, and its consideration with *Lamont* would contribute to sound judicial administration.

The court below recognized that the instant complaint "involves not only mail sent from abroad, as in *Lamont*, but also mail deposited in the United States domestic mail" (Opinion, Appendix, *infra*, p. 6a). That is, plaintiff Pappenheim's complaint is based solely on the statutory provision for detention of "mail . . . which originates . . . in a foreign country . . . upon its subsequent deposit in the United States domestic mail"; and plaintiff McReynolds' complaint is based in part on the statute's coverage of such domestic mail.

Not only does the instant case present the issue of detention of domestic mail, which is not presented by the *Lamont* facts, but it also poses, as indicated in the *Lamont* opinion, the question of the rights of a sender of mail. In *Lamont*, in discussing mootness and the possibility of a suit by a *sender* of "communist political propaganda," the Court refers to the instant case saying: "It would not appear that such a suit could be mooted by any administrative action, and it would equally serve to secure full protection of the rights of recipients." (Note 5 of Opinion, Jdl. St. Appendix, pp. 13a-14a.)

The Court below belittles the issue in this case of detention of domestic mail (Appendix, p. 10a). But there is no

basis for this deprecation. The statute grants the Post Office power over matter deposited in the domestic mail; the Post Office exercised the power in the case of mail deposited in the domestic mail by a New York bookstore, bearing the return address of the bookstore, and sent the addressee the usual form as to "communist political propaganda" originating in a foreign country; it thereafter tried to moot his case by the same device it uses with respect to all other plaintiffs; it has made no answer or defense except to claim mootness. The District Judge strains for a supposition, when he says "any screening of domestically-deposited mail" may have been "an error" (Appendix, p. 10a). The only element of obvious fortuity in the Pappenheim case is that the addressee had particular knowledge and interest in the mailing of this package of books.[3] Indeed, it is due in part to this fortuity that a suit involving domestic sending could be filed; generally, senders might well be ignorant of whether mail they dispatched was detained or destroyed.

Since the instant case involves domestic mail as well as mail on its arrival from abroad, and the sender as well as the recipient of mail, it involves facts and issues closely related to, but varying somewhat from, those in *Lamont*. Grant of the writ would therefore permit this Court a more rounded view of the statute and of the constitutional issues, and also of the meaning and effect of the *Lamont* decision, followed herein, on mootness and justiciability. (Cf.

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[3] Petitioners have no way of knowing the Post Office's precise methods of enforcing its power under the statute over domestic mail. The *Pappenheim* facts suggest that it detains packages showing the return address of particular bookstores to determine whether their contents are "communist political propaganda". The statement in the opinion of the Court below as to screening units at ports of arrival of foreign mail (Appendix, p. 9a), is taken from the allegations in the complaint of the cause of action of plaintiff McReynolds relating to such mail, which repeats public statements by Post Office officials shortly after the statute became effective.

Bolling v. *Sharpe*, 347 U. S. 497, in which writ of certiorari was granted before judgment in the Court of Appeals because of pendency of a related case in this Court.) If, on the other hand, the *Lamont* case were reviewed alone by this Court, disposition of the instant case might well necessitate a re-canvass of the basic problems and thus prove wasteful from the standpoint of judicial administration.

II.

The decision of the Court below is in conflict with the decisions of this Court. It is a significant First Amendment ruling both in itself and because it precludes judicial consideration of novel and important First Amendment issues.

The *Lamont* decision, which the Court below followed in holding the instant complaint non-justiciable, errs, we believe, in its application of this Court's decisions both on mootness and on the First Amendment.

A. *Mootness.*

The first prong of the *Lamont* reasoning is that the plaintiff can no longer complain of the effect on First Amendment freedom of the requirement that he explicitly request delivery of "communist political propaganda," because the Post Office has directed that he receive all such matter without prior contact by the Postmaster (Appendix to Jdl. St., p. 6a). The three-judge court (one judge dissenting) reads as inapplicable the holdings of this Court that voluntary cessation of allegedly illegal conduct does not moot the cause. The *Lamont* court reaches this conclusion in large part on the basis that here the "Postmaster General's actions have at all times been consistent with the mandate of the statute" (Appendix Jdl. St., p. 8a). This, we believe, is

the court's error—its view that the Postmaster's direction to deliver the plaintiffs' mail was in accord with the statute, and the court's consequent failure to recognize that the direction was merely a maneuver to moot pending litigation.

The statute does not envisage the Postmaster's procedure here: it makes no provision for the Postmaster to determine that an addressee wants "all communist political propaganda" and to send him all such "propaganda"—or all his mail—without interruption. Rather, the statute provides for determination of whether an individual item of "mail matter" is "communist political propaganda" and for the delivery of such "matter" if the Postmaster ascertains it is "desired by the addressee". Further, the Post Office form to notify an addressee of the detention of "communist political propaganda" provides for the addressee to check that the Post Office either should or should not "Deliver the publication" listed on the card or "Deliver all publications of this type" (See Appendix, *infra*, pp. 12a, 13a). There is no regular procedure under this statute for an addressee to say "Deliver all mail". Thus, when the Post Office disingenuously says that it views the institution of suit as the expression of the plaintiff's desire for delivery of all his mail, it is adopting a device that is outside the purview of the statute and outside its regular procedure. Accordingly, it is apparent that the Post Office's sole purpose was to avoid court review; by the same token, if the cases are determined to be moot, the Post Office might well resume in regard to petitioners its regular and established procedure, since it would no longer have reason to deviate from it. Compare *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632-3, respecting need for adjudication because of possible resumption of practice.

This Court recently said: "[T]he voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long standing." *Gray* v. *Sanders*, 372 U. S. 368, 376. While those adjectives do not precisely apply to the Post Office detention of "communist political propaganda" under this statute, it is equally important that the practice here "voluntarily abandoned" is rooted in statute, admittedly continues for everyone other than litigants, and is entirely lawful as long as court review of the statute is avoided.

The situation here is to be compared—to the discredit of the Post Office, we suggest—with the situation in *Mechling Barge Lines* v. *United States*, 368 U. S. 324 (cited in *Lamont* dissent, Appendix Jdl. St., p. 18a). There appellants contended that the Commission had made it a practice to issue a type of order without findings, and to vacate "such order whenever a judicial test of its validity appears imminent, thereby frustrating any review on the ground of mootness" (368 U. S. at p. 333, dissent). In this Court, however, the Commission "represents that it has amended its practices [with respect to findings] . . . It thus appears that one of the 'continuing practices' whose validity appellants would have us adjudicate continues no longer" (368 U. S. at 330-331). Here, however, the Post Office asserts no change of practice—except for litigants. It seems no more acceptable for Federal agencies to maintain a procedure while frustrating review of its constitutionality, than for State agencies or State courts (compare *NAACP* v. *Alabama*, 377 U. S. 288; *Staub* v. *Baxley*, 355 U. S. 313, 318-320).

Aside from their rights as addressees which the Post Office has tried to moot, petitioners' rights as senders as

well as their claims for damages for enforcement against them of an unconstitutional statute (compare *Wheeler* v. *Wheeldin*, 373 U. S. 647, 649), have substance, and are unaffected by the Post Office's effort to moot.

B. *Justiciability of Claimed Violation of First Amendment Rights.*

The second prong of the *Lamont* decision, followed herein, that there is no justiciable controversy, rests on a failure to accord First Amendment rights the protection due them under this Court's decisions.

The basic First Amendment objection to the statute is: to require an addressee to list himself as desiring "communist political propaganda" imposes an unjustifiable impediment and deterrent to the circulation of reading matter. The complaint alleges what would in any event be inferred—that the plaintiffs, because of legislation, Congressional investigations, and public reaction respecting Communists, feared the consequences of exposing themselves as individuals desiring "communist political propaganda." (And see Appendix, *infra*, p. 16a, as to apprehension even of academicians about requesting delivery of "communist political propaganda".) This Court's decisions recognize that such a pervasive fear of consequences, resulting directly and specifically from a government requirement, imposes a restraint on the exercise of First Amendment rights. An imminent and precise catastrophe from the opprobrious disclosure is not requisite; it is the threat of *possible* damage that is significant and coercive. First Amendment freedom is fragile and vulnerable. See *Talley* v. *California*, 362 U. S. 60, 65; *NAACP* v. *Alabama*, 357 U. S. 449, 451, 462-3, 465; *Louisiana* v. *NAACP*, 366 U. S. 293, 295-6; *Shelton* v. *Tucker*, 364 U. S. 479, 486; *Watkins*

v. *United States,* 354 U. S. 178, 197-8; *Anti-Fascist Committee* v. *McGrath,* 341 U. S. 123, 126, 139, 159, 161, 186.[4]

The Court below and the *Lamont* court err in analogizing this case to those that have been held unripe for adjudication because Government action was there only threatened. Here the Government requirement of opprobrious disclosure has been and is being imposed, with present deterrent effect of constitutional dimension. The only speculative point is how far the consequences of the Government action will extend, and how far the fear—which is a real, present, and existing deterrent—will be substantiated. One likely consequence, it should be noted, is the continuance of the prior "practice of the Post Office to disclose to Congressional committees the names of recipients of communist propaganda" (see Appendix to Jdl. St., p. 12a). The respondents' only disclaimer on this point is that "the file kept on addressees to whom propaganda had been sent would not be made public and that no part of this file could be released to any person, U. S. Government agency or other group, except with express permission from Post Office Department headquarters in Washington" (Affidavit of Associate General Counsel of Post Office Department, R. 45).[5]

Even assuming the Post Office has mooted the issue as to the requirement of a postcard request for delivery of "communist political propaganda," it has not substantially changed the First Amendment question herein. The Post Office now lists petitioners here and in *Lamont* as individ-

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[4] And the First Amendment unquestionably applies to regulation of second-class as well as first-class mail. See *Manual Enterprises* v. *Day,* 370 U. S. 478; *Roth* v. *United States,* 354 U. S. 476.

[5] As the *Lamont* dissent points out, the listed addressees would have no knowledge of the imminence of such a release of their names nor opportunity to then seek a remedy. See *Utah Fuel Co.* v. *Commission,* 306 U. S. 56, 60.

uals permanently desiring delivery of "communist political propaganda". The political content of their mail will continue to be subject to Government appraisal; they will receive what is appraised as "communist political propaganda" only because they are listed as desiring it; as long as the statute endures, they can have themselves de-listed only if they forego receipt of mail or make the postcard requests for delivery. Thus, the requirement of opprobrious self-exposure continues to operate on petitioners, and to restrain the First Amendment right to read and to communicate.

In sum, the decision of the Court below that the cause is non-justiciable is an erroneous application of this Court's decisions both on mootness and on the First Amendment. The misapplication is particularly significant because it forecloses review of important and novel constitutional questions.

III.

The statute presents important constitutional issues which should be and have not yet been, reviewed by this Court.

Operating as a deterrent and prior restraint on sending and receiving periodicals, books, leaflets, and other mail (*supra,* p. 13), the statute restricts the freedom to read and consider and the freedom to distribute and communicate. And the Government labeling of the reading matter of those who do get delivery of "communist political propaganda" unconstitutionally interferes with the free debate of ideas. See *Martin* v. *Struthers,* 319 U. S. 141, 143; *American Communications Association* v. *Douds,* 339 U. S. 382, 395; *Meyer* v. *Nebraska,* 262 U. S. 390, 401; *Whitney* v. *California,* 274 U. S. 357, 375 (dissent); *Leach* v. *Carlile,* 258 U. S. 138, 141; *Ex parte Jackson,* 96 U. S. 722, 733.

There is no conceivable evil that could justify, consistent with First Amendment principles, interference with the dispatch or receipt of the material covered by the term "communist political propaganda" as here defined; the statute therefore violates the Amendment. And in the absence of any general protection for addressees against delivery of unwanted mail, the First Amendment does not permit an allegedly protective measure which is directed only at the circulation of political ideas and which in fact restrains it.

The unjustifiable interference with privacy and the political surveillance imposed by the statute—albeit through inspection of unsealed mail—also present questions of violation of the Fourth and Fifth Amendments. Compare *Hannegan* v. *Esquire,* 327 U. S. 146; *School of Magnetic Healing* v. *McAnulty,* 187 U. S. 94, 110; *Barenblatt* v. *United States,* 360 U. S. 109, 127. In addition, the statute on its face and as applied violates the due process clause of the Fifth Amendment in that it employs an indefinite standard, arbitrary and unfair procedure, and an unreasonable discrimination as to the individuals subjected to restriction of their reading matter.

The statute is being applied throughout the country to thousands of pieces of mail monthly (Opinion of Court below, Appendix, *infra,* p. 3a); it employs a new device for the control of reading matter which has not been considered by this Court; its constitutionality under the First, Fourth, and Fifth Amendments should be reviewed by this Court.

CONCLUSION

It is respectfully submitted that this petition should be granted.

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October 1964.

APPENDIX

Judgment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Upon the opinion of this Court dated July 30, 1964 and filed July 31, 1964, it is hereby

ORDERED, that the plaintiffs' motion for summary judgment be, and the same hereby is, denied, and it is further

ORDERED, that the plaintiffs' motion for the appointment of a three-judge court be, and the same hereby is, denied, and it is further

ORDERED, that the defendants' motion to dismiss the amended complaint be, and the same hereby is, granted, and it is further

ORDERED, that the amended complaint herein be, and the same hereby is, dismissed, with prejudice, and with costs taxed in the sum of $20.00.

Dated: New York, N. Y.
August 31, 1964

CHARLES H. TENNEY
U.S.D.J.

Judgment entered 8/31/64
JAMES E. VALECHE, *Clerk*

Opinion by Tenney, *J.*

Plaintiffs move herein for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and for the appointment of a three-judge court to hear such motion pursuant to Rule 25 of the General Rules of this Court, and 28 U. S. C. §2282 (1950) and 28 U. S. C. §2284 (Supp. 1963). Defendants move herein, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, for an order dismissing the complaint on the ground that insofar as it relates to plaintiff McReynolds, the matter is moot; and insofar as it relates to plaintiff Pappenheim, it fails to state a claim.

This action seeks to test the constitutionality of Section 4008 of Title 39 of the United States Code (39 U. S. C. §4008 (1962)). Broadly speaking, Section 4008 requires the Postmaster General to detain all unsealed mail matter originating, printed or otherwise prepared abroad and found by the Secretary of the Treasury to be "communist political propaganda", unless such matter has been furnished pursuant to a subscription, or unless the addressee (upon being notified of the detention) requests delivery, or the Postmaster General otherwise ascertains the addressee's desire to receive the detained matter. There are certain further provisions making the statute inapplicable to mail addressed to federal agencies, public libraries, educational institutions, and their officials, and mail governed by a cultural exchange agreement.

The method of enforcement of Section 4008 is for the Bureau of Customs of the Treasury Department to determine which foreign countries are within the coverage of that Section in order to determine from which countries political propaganda, issued by or on behalf of such countries, constitutes "communist political propaganda."

Twenty-six countries have been determined to be within such coverage. The Bureau of Customs maintains eleven "Foreign Propaganda Units" for the screening of communist political propaganda originating abroad. The Post Office routes mail from each of the twenty-six countries designated by Customs to the particular Unit assigned to screen such mail, which Unit then determines whether the mail matter should be deemed "communist political propaganda." The mail so read and evaluated is then returned to the Post Office, where a portion is detained and a "notice" (P. O. D. Form 2153-X) is sent to the addressee. This notice identifies the material being detained and advises the addressee that it will be destroyed within twenty (20) days unless delivery is requested. The notice includes a reply card on which the addressee may inform the Post Office whether or not he wants the particular matter or similar matter delivered in the future. A list is kept of those requesting delivery of such material so that thereafter their mail will not be detained. The Post Office mails the notice with respect to approximately 4,000 pieces of mail per month, of which approximately 3,000 are under the charge of defendant Christenberry. Several hundred issues of magazines, brochures or other matter received in the Post Office for transmittal have been designated as "communist political propaganda." The delay in the transmission of mail due to the above procedures varies from a few days to more than a month.

Some addressees are required to return the reply card in order to receive an item of mail while other non-exempt addressees, of mail of similar content, are not. These differences in treatment are due (1) to variance in conclusions among Unit employees whether an item is "communist political propaganda", and (2) some items originating in

"Communist" countries are forwarded to the United States from another country and are not included in the detentions and examinations conducted under Section 4008.

McReynolds has for some time received, unsealed through the United States mails and from a foreign country, issues of a publication entitled "The Crusaders." On or about October 1, 1963, one issue of "The Crusaders" was detained by the Post Office Department, which sent McReynolds the notice above described, asking whether or not he wanted the unsealed mail matter. McReynolds did not respond to the inquiry and the single issue of "The Crusaders" was destroyed as provided in Section 4008.

On December 17, 1963, McReynolds filed the original complaint herein. In this original complaint McReynolds sought to enjoin the enforcement of the statute or for a declaratory judgment declaring it unconstitutional. The grounds alleged were that the statute infringed his First Amendment right to freedom of speech and press and violated the due process clause of the Fifth Amendment by creating arbitrary and unreasonable classifications.

On January 22, 1964, Louis J. Doyle, General Counsel for the Postmaster General, wrote McReynolds' counsel that the filing of the complaint by McReynolds was clear evidence of McReynolds' desire to receive all mail addressed to him and that all such "communist political propaganda" would henceforth be delivered to him.

Thereafter, and on March 30, 1954, an amended complaint was filed adding the plaintiff Fritz Pappenheim and adding a request for an order expunging the names of plaintiffs from all lists or records maintained by defendants showing the names of addressees of "communist political propaganda" or of addressees of notices in regard thereto. Also added was a claim for damages for violation of plain-

tiffs' "constitutional rights by interferences, delays or destruction of mail" pursuant to said statute and by any listing or recording of their names as such addressees.

In both the original complaint and amended complaint, McReynolds alleges a desire to have a copy of "The Crusaders" presently in his possession transmitted to an addressee (unnamed). However, he alleges that he does not wish to be listed as the sender of such material or to subject his addressee to such listing or to the necessity of affirmatively signifying his desire to receive such mail. He further alleges that he does not want to incur the risk that the addressee may not so signify and therefore may not receive such mail, or that, if he does receive it he may not read it or may be influenced in his reading of it by the fact that it has been labeled by defendants as "communist political propaganda."

Plaintiff Pappenheim alleges that on or about December 28, 1963, he purchased a number of books and documents at a bookstore in New York City. The majority of these items would appear to have been published in one or more of the proscribed foreign countries. They were purchased for use in Pappenheim's philosophical studies or for general reading interest. He paid for them and directed the bookseller to mail them to his, Pappenheim's, home in Cambridge, Massachusetts. Thereafter, on or about January 9, 1964, Pappenheim received a notice (P. O. D. Form 2153-X) indicating that the mail addressed to him and detained pursuant to the said statute was: "Dialectics of Nature/Professor Orochev's Delusion/The First Philosophers/et al"; that this mail would be destroyed unless defendant Christenberry received the return card requesting delivery by January 29, 1964. The notice included the statement that the Post Office was "holding unsealed mail matter addressed to you from a foreign country."

Opinion by Tenney, J.

On January 15, 1964, Pappenheim wrote defendant Christenberry asking from which country the package in question was addressed and what materials were included under "et al". Receiving no reply, he again wrote said defendant on January 27, 1964, asking for an extension of time beyond January 29th for the return of the card. He received no reply, but on March 6, 1964, plaintiff received in his mail the package of materials purchased, bearing on the wrapper the return address of the bookstore where he had made such purchases. On April 21, 1964, the defendant Christenberry was directed to deliver all mail regardless of its content to Pappenheim without further inquiry.

At the time the within motions were made there was pending before a three-judge panel of this Court the case of *Lamont* v. *Postmaster General of United States*, 63 Civ. 2422, decided on May 5, 1964, and reported in 229 F. Supp. 913 (1964). The facts, insofar as they affect an addressee, are not distinguishable from those in the instant case. However, the case at bar is distinguishable in that it allegedly involves not only mail sent from abroad, as in *Lamont*, but also mail deposited in the United States domestic mail. In addition, the case at bar includes a claim for damages not present in *Lamont*.

Before considering these distinguishing features, it might be advisable to consider the function and duties of the District Court when a request for appointment of a three-judge court is presented to it. In the first place, this request represents far more than a mere ministerial or procedural act. In another action, also involving the constitutionality of Section 4008, *Amlin* v. *Shaw*, 63-635-PH (S. D. Calif. Feb. 1964), the Court, which refused to convene a three-judge court and dismissed the complaint, stated:

> "It is the duty of the single District Court Judge, when a three-judge court is requested, to pass on the sufficiency of the Complaint, both as to the jurisdiction, i.e., whether or not a justiciable controversy is present, and whether or not a constitutional question is involved." (Citing cases.)

A single district court judge may dismiss a complaint which seeks an injunction restraining the enforcement, operation or execution of any Act of Congress as being unconstitutional, if he decides that a substantial constitutional issue is not raised therein. It is only where he decides that a substantial constitutional issue is raised and then proceeds to decide that issue on its merits that he acts without jurisdiction. *Wicks* v. *Southern Pac. Co.*, 231 F. 2d 130 (9th Cir.), cert. denied, 351 U. S. 946 (1956).

This principle was only recently reiterated in *Lion Mfg. Corp.* v. *Kennedy*, 330 F. 2d 833, 840 (D. C. Cir. 1964), where the Court specifically held it proper for a single judge to dismiss the complaint without convening a three-judge court. Such action by the single judge is, of course, reviewable by the Circuit Court of Appeals. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962).

As stated by Chief Judge Parker in *Jacobs* v. *Tawes*, 250 F. 2d 611, 615 (4th Cir. 1957):

> "[I]t would certainly be absurd to require that, in a case of which the court manifestly lacks jurisdiction, the District Judge must notify the Chief Judge of the Circuit to call in two additional Judges, the Chief Judge must call them in and all the cumbersome machinery of a court of three judges must be set in motion merely to dismiss the case. If the single District Judge in dismissing the case for lack of jurisdiction

commits error, the error can be corrected by appeal to the Court of Appeals without burdening the Supreme Court with a direct appeal."

With these basic principles in mind, I now proceed to the determination of whether a justiciable controversy is present in the case at bar. McReynolds and Pappenheim, as addressees of the mail material subject to the statute, are in the same position as was plaintiff in *Lamont*. In fact, Pappenheim is in a less favorable position, since he received the subject mail (without returning the required notice) prior to the time he instituted suit. Neither plaintiff contends, as in *Lamont*, that if there is no justiciable controversy between him and the Postmaster General, he should nevertheless be permitted to continue the action "in order to vindicate the rights of the many persons who are not willing or able to sue but who, like the plaintiff, have been and will be injured by this enforcement of the statute." See *Lamont*, 229 F. Supp. at 920. Even had such request been made, it would have to be denied upon the authority of *Lamont* and the cases cited therein in disposing of that contention. Both plaintiffs in the case at bar, as in *Lamont*, request an order directing that defendants remove their names from lists and records of persons desiring to receive "communist political propaganda." But here, again, the Court is presented with much the same facts as in *Lamont*, i.e., an affidavit of the General Counsel for the Postmaster General that any file kept on addressees to whom propaganda has been sent would not be made public and that no part of this file would be released to any person except upon express permission from the Post Office Department.

In the case at bar, both plaintiffs will receive the mailed material without further contact with defendants. Clearly, the same conclusion as to mootness reached in *Lamont* must be reached herein. In so doing I am not unmindful that plaintiffs have incorporated a claim for damages not present in *Lamont*. However, regardless of the validity or invalidity of the statute under which defendants acted and for which actions they are sought to be held accountable in damages, the claim is without merit and presents no justiciable issue. 28 U. S. C. §2680 (1950).

I now pass to that phase of the case at bar which differs from *Lamont*, i.e., plaintiffs' standing as *depositors* of such material in the domestic mail. See *Lamont, supra*, at 920 n. 5. It is possible, as indicated in *Lamont*, that a suit brought by a sender could not be mooted by administrative action. However, it is not clear from the pleadings whether defendants are prepared to enforce the statute insofar as it deals with foreign communist political propaganda "upon its subsequent deposit in the United States domestic mails." The "Foreign Propaganda Units" which the Bureau of Customs maintains are for the screening of communist political propaganda originating abroad The mail which the Post Office routes for screening is from the twenty-six foreign countries within the coverage of the statute. Nowhere is there any allegation that defendants maintain a list of the names of the senders of such mail or that there is any intention on the part of defendants to screen all second-class mail deposited in the United States domestic mails. The complaint of plaintiff Pappenheim does not necessarily support such a contention. The facts are not in dispute. He purchased and had mailed to himself certain mail matter which had originated in one of the twenty-six foreign countries referred to. He thereafter received a notice stat-

ing that the Post Office was holding mail addressed to him "from a foreign country." When he inquired from which country it had been addressed, the mail was delivered to him without further comment. It was only some time later, after he had brought the within suit, that any further action was taken by defendants, namely, instructions to defendant Christenberry to deliver all mail to Pappenheim without further inquiry. But such action, similar to that taken with respect to McReynolds, can be interpreted as a move to moot his claim as an addressee, not as an admission that any screening of domestically-deposited mail was other than an error. Pappenheim sent mail to himself and he received it. He does not claim that he desires to send such mail to *others* in the future, as does McReynolds, but to *himself*. This desire he may exercise without further leave of defendants. He may not, however, lift himself into this Court by his own jurisdictional bootstraps. Pappenheim's cause of action herein, as it relates to his ability to send himself mail, presents neither a justiciable controversy nor a substantial constitutional question.

I come now to McReynolds, insofar as his claim relates to the deposit in the domestic mail of the material covered by the statute. Unlike Pappenheim, McReynolds does not allege that he has ever so deposited such mail. He does allege a desire to mail a copy of "The Crusaders" to "an acquaintance residing in the United States." He desires to send it by unsealed mail because of the lower rate, and to place thereon his return address.

Does this create a justiciable controversy? I think not. What will happen if and when McReynolds does mail the copy is purely speculative. There is no evidence that McReynolds' name will be listed by defendants as the sender of such mail by reason of his return address placed there-

on, or that the mail will be detained, or that the addressee desires to receive such mail and, if so, whether the addressee has any compunction about so indicating.

Furthermore, even were it possible to spell out a controversy, co-existent with the doctrine requiring the existence of an actual controversy is the doctrine that the controversy must be "ripe" for determination. See *Poe* v. *Ullman,* 367 U. S. 497 (1961); *Communist Party* v. *Subversive Activities Control Bd.,* 367 U. S. 1 (1961); *Public Service Comm'n* v. *Wycoff Co.,* 344 U. S. 237, 243-4 (1952). That condition, in my opinion, is not met by the present case.

Accordingly, defendants' motion to dismiss the complaint is granted. Plaintiffs' motions are denied.

Settle orders on notice.

Dated: New York, New York.
July 30, 1964.

CHARLES H. TENNEY
U.S.D.J.

Notice From Post Office—POD Form 2153-X

10-21-63

INSTRUCTIONS

DELIVER

☐ This publication

☐ Similar publication

DO NOT DELIVER

☐ This publication

☐ Similar publication

"THE CRUSADERS"

DAVID MCREYNOLDS
60 EAST 4TH STREET
NEW YORK, N. Y.

POD Form 2153-X,
Jan. 1963

(Detach here)

MESSAGE TO ADDRESSEE

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Secretary of the Treasury has determined this mail to be Communist political propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate spaces under "Instructions" on this card and return the card. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publication. This mail will then be destroyed.

Postmaster

Notice From Post Office—POD Form 2153-X

"Dialectics of Nature

Professor Orochev's
Delusion

The First Philosophers"
et al.

☐ 1. Deliver the publication(s) listed above

☐ 2. Deliver all publications of this type

☐ 3. Do not deliver the above

☐ 4. Do not deliver any publications of this type

This card must be returned by Jan. 29, 1964
(Date)

Frits Pappenheim
7 Linnaean St.
Cambridge 38, Mass

POD Form 2153-X,
Aug. 1963

(Detach here)

Message to Addressee

This office is holding unsealed mail matter addressed to you from a foreign country. Under Public Law 87-793, the Customs Bureau of the Treasury Department has determined this mail to be Communist p o l i t i c a l propaganda. It cannot be delivered to you unless you have subscribed to it, or otherwise want it. Please check the appropriate box on this card and return. If your reply is not received by the date indicated, it will be assumed that you do not want to receive the publication(s) listed, or any similar publications. If more than one publication is listed on the card and you want to receive one or more, but not all of them, cross out the ones you don't want and check box #1.

Postmaster

Letter Dated December 31, 1963

AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SLAVIC STUDIES*

112 Davenport House University of Illinois
Champaign, Illinois

December 31, 1963

Memo to: Officers and other Members of the Board

From: Ralph Fisher

Subject: Responses to questionnaire about delivery of "Communist propaganda."

Early in December, as you will recall, the regular members of the Association were sent the following inquiry:

Dear Member:

At its recent meeting in New York, the Board of the Triple A Double S took note of a New York Times story of October 24 which reported in part as follows:

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* Board of Directors—1964.

Elected at large: John A. Armstrong, Joseph S. Berliner, Alexander Dallin, Victor Erlich, Franklyn D. Holzman, Gleb Struve.

Representing organizations: Robert C. Tucker (Political Science), Donald W. Treadgold (JCSS), Edward J. Brown (Language and Literature), Holland Hunter (Economics), George Kish (Geography), Robert F. Byrnes (History).

Officers—1964.

President: Joseph S. Berliner, Department of Economics, Brandeis University, Waltham 54, Mass.; Vice President: John A. Armstrong, Department of Political Science, University of Wisconsin, Madison 6, Wisconsin; Secretary: Ralph T. Fisher, Jr., 112 Davenport House, University of Illinois, Champaign, Ill.; Treasurer: John N. Hazard, 431 West 117th St., Columbia University, New York 27, N. Y.; Managing Editor of the Slavic Review: Donald W. Treadgold, 508 Thomson Hall, University of Washington, Seattle 5, Wash.

Letter Dated December 31, 1963

'Under a law passed by Congress last January, the Post Office has been delaying the delivery of what it judges to be Communist propaganda mailed from foreign countries. In many cases this mail is unsolicited.

'Addressees are notified that the material is being held. They may have it delivered by filling out a form.'

Members of the Board wondered to what extent specialists in the field have in fact been experiencing any obstacles to the normal delivery of materials from Soviet-bloc sources. The Board decided to send out this informal inquiry in the next general mailing. Your reply will aid the Board in deciding whether any action is desirable on its part. Please mail the lower portion of this sheet back with your proxy.

The lower part of the sheet provided space for checking either "I have experienced no obstacles to delivery of materials from Soviet-bloc sources," or "I have experienced obstacles." If he checked the latter, the respondent was asked to "explain what the difficulties were, what action you took, and what was the result."

A total of some 291 replies was received. Of these, 212 simply indicated that they had experienced no obstacles, and let it go at that.

Of the remaining 79, about half had also experienced no obstacles, but wished to make some comment anyway. Several people observed (as many of the above 212 probably could have) that the reason they experienced no difficulties was that they did not receive materials from the Soviet bloc anyway. Six persons indicated that they knew of

others whose mail was held up. Two of these remarked that they knew of people who had been afraid to send in the form saying that they wanted the material in question, and had thus foregone receiving it.

About forty of our members reported having had their mail held up. Thirty-three of these said that after they notified the postal authorities that they wanted to receive all such material, they had had no further trouble. Three, however, said they had had repeated clashes with the postal authorities, even after making their positions clear.

Although our questionnaire did not ask specifically about the use of home as opposed to university or institutional addresses, four persons volunteered the information that the materials held up were addressed to their homes. Some suggested that the use of an institutional address would eliminate interference by the postal authorities, but at least one person had also had mail held up which was addressed to his office.

Four persons complained that they had found the post office's deadline for replies was set too early to allow time for the forwarding of the notice, especially during vacations. This meant that by the time the addressee returned the form saying he wanted the publication, it had already been destroyed.

One justification for the law has been the alleged need of protecting the unwary American citizen from a barrage of unsolicited propaganda from abroad. But the way the law is being administered casts doubt upon this explanation, for twenty-two of our members reported that the materials that were held up were *subscription* copies. This seems deserving of special note.

Letter Dated December 31, 1963

A sentiment made explicit by fourteen persons and implicit in the remarks of many others was that the Association should do something about repealing the law.

• • • • •

Sincerely,

/s/ RALPH

Ralph T. Fisher, Jr.
Secretary

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 605

DAVID MCREYNOLDS AND FRITZ PAPPENHEIM,
PETITIONERS

v.

ROBERT K. CHRISTENBERRY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

The petitioners seek review, prior to judgment in the court of appeals, of an order of the district court dismissing an action challenging the constitutionality of 39 U.S.C. 4008. That section requires the postal authorities to detain unsealed mail matter which, under Section 1(j) of the Foreign Agents Registration Act, 22 U.S.C. 611(j), constitutes "communist political propaganda" and which originates, is printed or otherwise prepared in a foreign country. The postal authorities are required to detain all such mail which is

not furnished pursuant to subscription and which is not known to be desired by the addressee, and are to deliver such mail only upon the addressee's request.

The constitutionality of Section 4008 is also involved in *Lamont* v. *Postmaster General*, No. 491, this Term, pending on jurisdictional statement. In the *Lamont* case a three-judge district court dismissed a similar suit, holding (1) that any controversy as to the Postmaster General's detention of mail had become moot because the Postmaster General had treated the filing of the suit as a request for the delivery of the detained mail, and therefore had released the particular mail involved and had issued instructions that further mail addressed to the plaintiff there should not be detained; and (2) that insofar as the suit challenged the retention of the plaintiff's name on a Post Office list or in its files of persons who had requested such mail, it did not present any justiciable controversy. The government has filed a motion to affirm in the *Lamont* case, in which it argues that the district court properly dismissed the complaint without reaching the substantive issues, and that this Court should affirm on that ground. We further stated, however, that since the constitutional claim cannot be considered insubstantial, probable jurisdiction should be noted if the Court were of the view that there is a substantial question concerning the district court's ground for dismissal.

We see no occasion to depart from the normal processes of appellate review in this case. If the Court grants our motion to affirm in *Lamont*, we believe that

the ruling would control the present case; in any event, the court of appeals is the proper tribunal to determine initially whether the present case is distinguishable from *Lamont*. If, on the other hand, this Court should note probable jurisdiction in *Lamont*, the court of appeals can then decide whether to decide this case or defer further proceedings until *Lamont* has been decided. There is no occasion to add an unnecessary case to the docket in advance of decision by the court of appeals. If the Court should note probable jurisdiction in *Lamont*, the government would consent to the filing in that case of a brief *amicus curiae* by the present petitioners.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

NOVEMBER 1964.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 754088 393